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# The State of Utah v. Lonnie David Case : Brief of Respondent

Utah Supreme Court

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Vernon B. Romney; Attorney General; Earl F. Dorius; Assistant Attorney General; Attorneys for Respondent.

Robert Van Sciver; Randall T. Gaither; Attorneys for Appellant.

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IN THE SUPREME COURT OF THE STATE OF UTAH

---

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

LONNIE DAVID CASE,

Defendant-Appellant.

Case No. 14256

---

# BRIEF OF RESPONDENT

---

APPEAL FROM THE JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT, IN AND FOR SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE GORDON R. HALL, JUDGE, PRESIDING.

---

VERNON B. ROMNEY
Attorney General

EARL F. DORIUS
Assistant Attorney General

236 State Capitol
Salt Lake City, Utah 84114

Attorneys for Respondent

ROBERT VAN SCIVER
RANDALL T. GAITHER

321 South Sixth East
Salt Lake City, Utah 84102

Attorneys for Appellant

FILED

JAN 9 - 1976

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE

STATE OF UTAH

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STATE OF UTAH,

Plaintiff-Respondent,

-vs-

LONNIE DAVID CASE,

Defendant-Appellant.

Case No. 14256

---

# BRIEF OF RESPONDENT

---

## STATEMENT OF NATURE OF CASE

This is a criminal case in which the appellant, Lonnie David Case, was charged with the crime of aggravated robbery, Utah Code Ann. § 76-6-302 (1953), as amended, by an information filed in the Third Judicial District Court of Salt Lake County, State of Utah, on May 15, 1975.

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## DISPOSITION IN LOWER COURT

The appellant was tried to a jury before the Honorable Gordon R. Hall, District Judge, on August 22, 1975, and found guilty of aggravated robbery. Appellant was sentenced on the same day.

## RELIEF SOUGHT ON APPEAL

Respondent submits that the jury verdict of guilty was correct and should be affirmed.

## STATEMENT OF THE FACTS

Appellant was charged with and convicted of the crime of aggravated robbery which occurred April 10, 1975.

Myrna Barker, an employee of the 7-11 Store at which the robbery took place, testified that on that day at approximately 10:00 o'clock p.m. a man whom she identified as appellant entered the store, bought a package of corn chips, and then walked around the store eating them (Tr.50). The man then came up behind Mrs. Barker, put a knife against her back, and demanded money (Tr.51). The man put the money in his pocket and fled on foot.



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Appellant was arrested the next day and was subsequently charged with the robbery. Appellant's attorney attempted to establish through defense witnesses that appellant was at a party during the time of the robbery. The State used the defense witnesses and its own witness, Mrs. Barker, to rebut the alleged alibi.

During the presentation of the State's rebuttal witnesses, defense counsel on cross-examination elicited an answer from Craig Christensen which indicated that appellant had been in prison prior to his arrest in the present case (Tr.138).

On re-direct by the State, Mr. Christensen made a similar reference to appellant's prior residence at the prison (Tr.140). Neither counsel pursued the subject of appellant's previous incarceration nor was it emphasized or elaborated upon by either counsel.

After hearing all the evidence, the jury returned a verdict of guilty and sentence was passed by Judge Hall.



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ARGUMENT

POINT I

THE TRIAL COURT CORRECTLY ALLOWED THE STATE'S EVIDENCE REBUTTING APPELLANT'S ALLEGED ALIBI AND APPELLANT'S RIGHT TO RECIPROCAL DISCOVERY WAS NOT DENIED.

Appellant's attorney filed a notice of alibi pursuant to Utah Code Ann. § 77-22-17 (1953), as amended, which states:

> "(1) Upon the written demand of the defendant, the prosecuting attorney shall specify in writing as particularly as is known to him, the place, date, and time of the commission of the offense. A defendant in a criminal case, whether or not such written demand has been made, who intends to offer evidence of an alibi in his defense shall, not less than ten days before trial or such other time as the court may direct, file and serve upon the prosecuting attorney a notice in writing of his intention to claim an alibi; the notice shall contain specific information as to the place where the defendant claims to have been at the time of the alleged offense and, the names and addresses of the witnesses by whom he proposes to establish the alibi. Not less than five days after receipt of defendant's witness list, or such other



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> times as the court may direct, the prosecuting attorney shall file and serve upon the defendant the names and addresses of the witnesses the state proposes to offer in rebuttal to discredit the defendant's alibi at the trial of the cause.
>
> (2) Both the defendant and the prosecuting attorney shall be under a continuing duty to promptly disclose the names and addresses of additional witnesses which come to the attention of either party subsequent to filing their respective witness lists as provided in this section.
>
> (3) If a defendant fails to file and serve a copy of the notice as required in subsection (1), the court may exclude evidence offered by the defendant for the purpose of proving an alibi, except the testimony of the defendant himself. If the prosecuting attorney fails to file and serve a copy on the defendant of a list of witnesses as provided in subsection (1), the court may exclude evidence offered by the state in rebuttal to the defendant's alibi evidence.
>
> (4) For good cause shown the court may waive the requirements of this section."

Respondent agrees with appellant that the above quoted statute does not have the constitutional infirmities which may have weakened Utah's former alibi provisions.

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While the present statute requires reciprocal discovery it still gives the trial court considerable discretion in accepting or excluding evidence related to an alibi defense. Subsection (3) indicates that if either defendant or prosecution fail to file notice of the proposed witnesses the court may exclude evidence. (Emphasis added.) The language is clearly discretionary and from the context of the rest of the provision it can be seen that the use of discretionary language was purposive.

Even if the discretionary language of Subsection (3) is ignored, the trial court correctly allowed the State's rebuttal evidence.

The United States Supreme Court decision relied upon by appellant to compel reciprocal discovery is much more limited than appellant indicates. The holding in Wardius v. Oregon, 413 U.S. 470 (1972), states:



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> " . . . the Due Process Clause of the Fourteenth Amendment forbids enforcement of alibi rules unless reciprocal discovery rights are given to criminal defendants." Id. at 472.

The enforcement of alibi rules against a defendant is not at issue in the present case. Respondent submits that the Pennsylvania decision in Commonwealth v. Jackson, ___ Pa. ___, 319 A.2d 161 (1974), is an unwarranted extrapolation of Wardius. It takes the very narrow holding of Wardius and expands it far beyond its clear meaning. The strong dissent of four Pennsylvania justices in Jackson more correctly interprets Wardius. The dissent of Justice Pomeroy, for example, states that the decision is based on a "misconstruction" of the holding in Wardius and suggests that Wardius must be read more literally.

The purpose of the alibi statutes as stated in Wardius is to avoid unfair surprise by introducing testimony from "secret" witnesses. No such danger was present here. The State did not call any new witnesses in rebuttal of appellant's alibi. It relied on witnesses known to the defense, even subpoenaed by the defense and on its own

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witness, Mrs. Barker. Appellant was not therefore prejudiced by the appearance of a previously unknown "surprise" witness.

In a case with a disclosure of evidence statute similar in purpose to Utah's alibi statute, the Washington Court of Appeals in State v. Woods, 3 Wash.App. 691, 477 P.2d 182 (1970), stated that where the statute was designed to prevent surprise there must be surprise in fact and a timely claim of that surprise made. Respondent maintains that a similar interpretation of the Utah alibi defense statute is warranted in the present case.

In light of the inapplicability of Wardius, the overbroad decision of Jackson, the clear discretionary language of the Utah statute itself, and the non-prejudicial nature of the prosecution's alleged contravention of the statute, the trial court correctly allowed the State to present rebuttal of appellant's alibi.

POINT II

THERE WAS NO ERROR IN THE INADVERTENT DISCLOSURE BY THE DEFENSE'S WITNESS THAT APPELLANT HAD BEEN INCARCERATED AT THE STATE PRISON.

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The two alleged prejudicial comments about appellant's prior incarceration are found at pages 138 and 140 in the transcript. Both comments were made by Craig Christensen, a witness subpoenaed by the defense but called by the State on rebuttal. The first statement came during cross-examination by appellant's own attorney. The second comment came on re-direct examination by the state. It was in response to an innocent question about where appellant was living. No comment was made to the jury by either counsel concerning these two unexpected statements.

Utah law does permit evidence of prior felony convictions to be introduced. State v. Dickson, 12 Utah 2d 8, 361 P.2d 412 (1961); State v. Hougensen, 91 Utah 351, 64 P.2d 229 (1936). Such evidence is excluded, however, if its only purpose is to disgrace the defendant as a person of evil character with a propensity to commit crime. State v. Lopez, 22 Utah 2d 267, 451 P.2d 772 (1969). See also State v. Johnson, 25 Utah 2d 160, 478 P.2d 491 (1970).



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Such was not the purpose of the two statements in question here. Appellant cites State v. Dickson, supra, and State v. Kazda, 14 Utah 2d 266, 382 P.2d 407 (1963), for the proposition that evidence of another crime is prejudicial.

In Dickson, a prosecutor's questions concerning a crime for which the defendant had been charged subsequent to the one on appeal were error because the defendant had not been tried or convicted of the subsequent crime.

In Kazda, error was found when a police officer was allowed to relate at length conversations with the defendant concerning various crimes which had been committed in other states.

The facts in the present case do not approach those in Dickson or Kazda. No mention was made here of appellant's past crimes or conduct. Both comments were short and unembellished.

The Utah Legislature has enacted a harmless error rule. Utah Code Ann. § 77-42-1 (1953). It mandates that

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only errors which affect the substantial rights of the parties can justify reversing a lower court decision. No substantial rights of the appellant were compromised in the present case. The trial judge with the best perspective of the effect of testimony on the jury denied defense counsel's motion for mistrial. The presumption of validity given to trial court determinations cannot be rebutted by the two statements made by Mr. Christensen. The trial court correctly ruled that the statements were nonprejudicial and did not affect the substantial rights of appellant.

## CONCLUSION

Appellant was tried and convicted of aggravated robbery. His right to an alibi defense was not compromised or vitiated by any surprise rebuttal witnesses introduced by the prosecution. Statements concerning appellant's prior incarceration at the State Prison did not prejudice appellant's case. Based on the foregoing, respondent contends that the verdict below should be affirmed.



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Respectfully submitted,

VERNON B. ROMNEY
Attorney General

EARL F. DORIUS
Assistant Attorney General

Attorneys for Respondent



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